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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 602

MEYER GORDON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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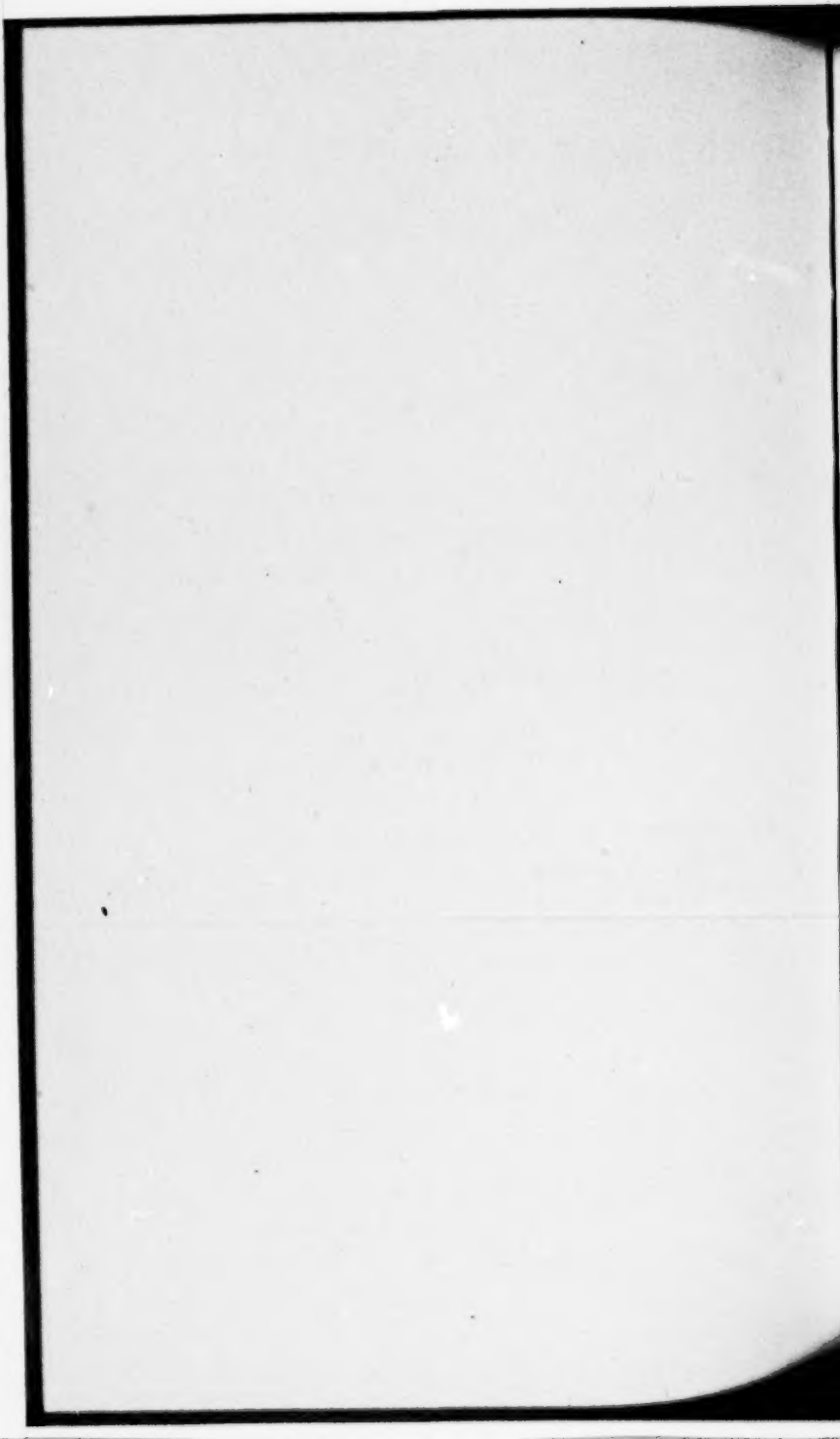

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THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable, The Chief Justice and The Associate Justices:

Meyer Gordon, Petitioner, prays for the issuance of a writ of certiorari to review a judgment of the United States Circuit Court of Appeals for the Sixth Circuit, entered December 8, 1947, in this cause, its number 10,275 (R. 469), affirming a judgment of the District Court of the United States for the Eastern District of Michigan (R. 50, 51). Timely Motion for rehearing was filed in the Court of Appeals (R. 479-93), which was denied January 19, 1948 (R. 495). The Opinion of the Court of Appeals appears in the record herein (R. 470-78), and is not yet reported.

Questions Presented

I

Was Petitioner denied due process, under the Fifth Amendment, when his trial, on a conspiracy charge, proceeded in the absence of two principal co-defendants, his ensuing conviction having been based principally on the evidence of a third principal co-defendant, who was then under sentence for a prior Federal offense, and whose testimony could not, by reason of the absence of said two co-defendants, be controverted, Petitioner and the other defendants not testifying?

II

Can Section 591, Title 18, United States Code (Section 1014, Revised Statutes), the so-called removal statute, be invoked to effect the production for trial, for Federal offense, of co-defendants incarcerated for State offense outside of the District and State of the trial? Or, in such circumstances, is a writ of *habeas corpus ad prosequendum*, issued by the indicting Federal Court, upon the State Warden holding such co-defendants, the only available procedure?

III

What is the standard, for jurisdictional purposes, to be applied in determining "value of $5,000 or more" in Section 415, the so-called National Stolen Property Act (Title 18, United States Code, Section 413 *et seq.*)?

IV

Does the sentence imposed upon Petitioner constitute double punishment, within the prohibition of the Fifth Amendment?

V

Does the sentence imposed upon Petitioner constitute a cruel and unusual punishment, within the prohibition of the Eighth Amendment?

Statutes Involved

The following Sections, Title 18, United States Code: (Section 415)

> "Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of $5,000 or more, theretofore stolen, feloniously converted, or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen, feloniously converted, or taken . . . shall be punished by a fine of not more than $10,000 or by imprisonment for not more than ten years, or both . . ."

(Section 418a)

> "If two or more persons enter into an agreement, confederation, or conspiracy to violate any provision of Sections 413-419 of this title, and do any overt act toward carrying out such unlawful agreement, confederation, or conspiracy, such person or persons shall be punished in like manner as hereinbefore provided by sections 413-419 of this title."

(Section 591)

> "For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any United States commissioner, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace or other magistrate, of any state where he may be found, and agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested and

imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. . . . Where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had."

Jurisdiction

This Court has jurisdiction under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (Chapter 229, 43 Stat. 936), and by virtue of alleged violations of the United States Constitution, and under Rule 37(b)(2) of the Federal Rules of Criminal Procedure, and in conformity with Rule 38 of this Court, Section 5, subparagraph (b).

Statement of the Case

On September 11, 1943, indictment was filed in the District Court of the United States for the Eastern District of Michigan, Southern Division, charging Petitioner, and also Herman Frank Banning, Bernard Sidran, Howard Julian Graves, Abe Zussman, and Bernard F. Gridley, with (Count 1) conspiracy to violate aforementioned Section 415, Title 18, United States Code, and with (Count 2) violation of the Section (R. 1-6). The substantive crime charged was the transportation from Detroit to Chicago on September 13, 1940, of jewelry allegedly stolen from one Walter Ollendorff at Detroit (R. 6). At that time, Sidran and Graves were confined in the Ohio State Penitentiary at Columbus, Ohio, for a State offense (R. 478). They were produced for arraignment on February 28, 1944, pursuant to writ of *habeas corpus ad prosequendum* issued by the indicting United States District Court. After pleading not guilty,

they were then returned to that Penitentiary. Zussman, Gridley and Petitioner also pleaded not guilty (R. 7, 8). Banning, remaining co-defendant, pleaded guilty (R. 162). His sentencing was deferred (R. 162). He became principal witness for the prosecution (R. 437, 470). He was then under Federal sentence of twenty years for conspiracy to rob, and for the robbery of, one Samuel Weiss near Detroit on August 28, 1940 (R. 162, 172, 182, 183, 195), having been convicted in the aforementioned United States District Court for the Eastern District of Michigan (R. 183). This conviction and sentence were affirmed on appeal (R. 162, 172, 182) (130 F. 2d 330).

Trial in the instant case began on May 6, 1946, and was concluded May 23, 1946 (R. 48). Although further writ of *habeas corpus ad prosequendum* was issued by the above United States District Court for the production of Sidran and Graves, the Ohio State Penitentiary Warden declined on this occasion to honor the same (R. 52). These co-defendants were absent throughout the trial (R. 430). No other process or proceeding was undertaken to effect their presence. No severance was granted or requested. At the end of the trial, Gridley was dismissed (R. 410). Petitioner and Zussman were found guilty as charged (R. 48). The conviction was based principally upon the testimony of co-defendant Banning (R. 437, 470). Petitioner was thereupon sentenced to ten years and a fine of $10,000 on each of the counts, the sentences to run consecutively (R. 50, 51), making total sentence of twenty years and $20,000 fine (R. 51).

Zussman was sentenced to two and one-half years on each count, the sentences to run consecutively, and $2,500 fine.

Petitioner appealed to the United States Circuit Court of Appeals for the Sixth Circuit (R. 444), which, as above stated, affirmed on December 8, 1947 (R. 469, 478), and on January 19, 1948, denied rehearing (R. 495).

On May 31, 1947, Federal pardon was granted Banning from his sentence for aforementioned conspiracy to rob, and the robbery of, Samuel Weiss near Detroit on August 28, 1940. His conviction in that cause had been based primarily on the testimony of his co-defendant therein, Frank McMann, then also under Federal sentence for a prior offense, who had pleaded guilty, and testified against Banning (R. 183, 272) (130 F. 2d 330).

Some time subsequent to the conclusion of the trial in the instant matter, Banning was given a suspended sentence therein.

Graves and Sidran have never been brought to trial in the instant matter.

Reasons Relied upon for Allowance of the Writ

I

This trial on a conspiracy charge was allowed to proceed in the absence of the two principal co-defendants, Sidran and Graves (R. 52, 430), the ensuing conviction being based principally on the evidence of third principal co-defendant Banning (R. 437, 470), then under sentence for a prior Federal offense (R. 162, 172, 182), whose testimony could not, by reason of the absence of said two co-defendants, be controverted, the Petitioner and other defendants not testifying.

Some time following the conclusion of the trial, it was learned by Petitioner for the first time that if Sidran and Graves had been present, they would have testified in refutation of the testimony of Banning. Petitioner then brought this situation to the attention of the Court of Appeals where his appeal was then pending, in the form of a motion to suspend appellate proceedings, and remand the cause to the District Court. This motion was denied.

Even if Petitioner had known at the time of trial what the nature of the testimony of Sidran and Graves might

have been, he was without legal means to compel their presence at the trial.

Petitioner's injury was real, shown by the resulting conviction and sentence of twenty years and fine (R. 50, 51).

The Trial Court stated in its charge:

> "I think that the Government's case must rest or fall on Banning, all of it" (R. 437).

The Court of Appeals recognized the same controlling situation:

> "The conviction was based principally on the testimony of Herman Frank Banning, a co-defendant under the indictment" (R. 470).

Petitioner contended that by reason of the aforementioned circumstances in connection with the trial, he was denied a fair trial.

But the Court of Appeals ruled (R. 478):

> "Sidran and Graves, during the period of these criminal proceedings, were confined in the Ohio State Penitentiary under a State sentence for jewelry robbery * * * a writ of habeas corpus was applied for in order to secure their presence at the trial; but the Warden of the Ohio State Penitentiary refused to produce them. * * * Since no authority could compel them to be present, the proceedings in this respect were not unfair."

Therefore, the Court of Appeals has so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

II

Petitioner contended that to assure the presence of Sidran and Graves at the trial, the Government could, and should,

have invoked the provisions of the aforementioned removal statute (Section 591, Title 18, United States Code; Section 1014, Revised Statutes).

But the Court of Appeals ruled (R. 478):

> "The transfer of a prisoner from Federal to State jurisdiction, or vice versa, for trial under an indictment, is exercised under the rules of comity. (Cf. *Ponzi* v. *Fessenden*, 258 U. S. 254. There is no express authority authorizing the transfer of a prisoner held under a judgment of conviction in a state court to a federal court upon a federal charge. The Government took all available steps to secure the presence of Sidran and Graves at the trial."

Such express authority does exist, namely, Section 591, Title 18, United States Code (Section 1014 Revised Statutes). Where removal of a prisoner from one district to another, for trial, is necessary, Section 1014, Revised Statutes, may be invoked. *McCarty* v. *United States District Court for the Western District of Arkansas*, 19 F. 2d 462, 463, C. C. A. 8. See also *United States ex rel Coleman* v. *Cox, District Judge*, 47 F. 2d 968, C. C. A. 3.

Therefore, in the cause at bar, the Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court.

III

The property in question comprised sample watch cases, made of base metal, some with works, others empty, used exclusively as samples in the soliciting of orders, and admittedly non-marketable (R. 219).

The only direct evidence of value was the amount paid by the insurance company on claim by the watch company (R. 62, 207, 210, 211). This amount, which was $4,600, was not paid upon the property alleged to have been transported

to Chicago, but was paid upon the value to the company of the samples with which its representatives had left New York City on an extended sales trip (R. 210, 215). The proofs failed to establish that all of the property with which such representatives had left New York City, was stolen at Detroit (R. 218). Direct evidence does exist that not all of the property stolen at Detroit was transported to Chicago, as a portion was destroyed through means of fire at Detroit, immediately following the larceny (R. 285, 287, 288). The Court of Appeals recognized that less property was transported than stolen, when it found (R. 472) that "the *bulk* of the jewelry was taken to Chicago." (Italics ours.)

Under these facts, Petitioner contended that there was no jurisdiction under Section 415, Title 18, United States Code, and also that evidence as to retail value should not have been admitted.

But the Court of Appeals ruled (R. 474):

> "It was proper to receive in evidence testimony as to the retail value of these items. Husten *v.* United States, 95 F. 2d 168 (C. C. A. 8)."

The *Husten* case was no precedent, because the basic facts are different. There, retail market value actually existed.

Available decisions of United States Courts of Appeals, touching on the question of measure of value under Section 415, Title 18, are divergent, and fail to set forth any standard for the determination of this jurisdictional prerequisite. *Reynolds* v. *United States,* 152 F. 2d 586, C. C. A. 5; *United States* v. *Garvey et al.,* 150 F. 2d 767; *Petrilli* v. *United States,* 129 F. 2d 101; *Backun* v. *United States,* 112 F. 2d 635, C. C. A. 4. Therefore, this Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court.

IV

The imposition of a sentence of ten years' imprisonment and a fine of $10,000 on the substantive count, and of a like sentence and fine for alleged conspiracy to commit the substantive offense, constitutes double punishment, within the prohibition of the Fifth Amendment.

Petitioner's contention in this regard has basis in the following statement and ruling of the Court of Appeals (R. 474):

> "In view of the corroborative testimony as to the appellant's assistance in these operations, (the context indicating the theft at the Book-Cadillac Hotel in Detroit) later discussed, substantial evidence existed requiring the submission to the jury of the question of appellant's guilt under the substantive count" (Parenthetical matter inserted).

However, no subsequent discussion of any such stated testimony tending to corroborate participation in the theft at the Book-Cadillac Hotel, appears in the Opinion. (Italics ours.) It does discuss testimony stated as sufficient to establish a conspiracy to violate Section 415.

Therefore, the Court of Appeals has adopted a rule of law which might be utilized to extend offenses and punishments beyond the concepts of reasonable law enforcement.

In the instant case the proofs established that Petitioner at the most was a "fence," and accessory after the fact (R. 86, 87, 233, 317, 324, 325). To say that he was properly punishable upon the theory of an aider and abettor, that is, because he was a member of the conspiracy charged, serves only to emphasize the double punishment imposed. Such a rule of law also ignores the specific statutory prohibition provided in Section 416, Title 18, United States Code, penalizing the receiver of such stolen goods.

Accordingly, the Court of Appeals so far departed from

the accepted and usual course of judicial proceedings, or so far sanctioned such departure by the Lower Court, as to call for an exercise of this Court's power of supervision.

V

The sentence imposed upon Petitioner of twenty years and $20,000 fine constitutes cruel and unusual punishment within the prohibition of the Eighth Amendment.

Conclusion

WHEREFORE, it is submitted that this Petition for allowance of a writ of certiorari should be granted.

JOHN WATTAWA,
DONALD B. FREDERICK,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 602

MEYER GORDON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

The opinion of the Court of Appeals appears in the record at pages 470-478, and is not yet reported.

The questions presented, Statutes involved, Statements of Jurisdiction, and of the Case, and Reasons Relied upon, appear in the foregoing Petition, and in the interest of brevity are not repeated here.

Specifications of Error

I

The Court of Appeals erred in holding that Petitioner's trial was not unfair, despite the absence therefrom of principal co-defendants Sidran and Graves (R. 478).

II

The Court of Appeals erred in holding that no express authority exists authorizing the transfer, to a Federal Court

for trial, of a prisoner held in another State and District under a State judgment of conviction; and that in procuring the issuance of *Habeas Corpus ad Prosequendum* from the indicting United States District Court, the Government took all available steps to insure the presence of Sidran and Graves at the trial (R. 478).

III

The Court of Appeals erred in ~~receiving~~ approving testimony as to the retail value of the property consisting entirely of samples used solely in the soliciting of orders thereon, and thereby improperly expanded jurisdiction under the National Stolen Property Act (R. 474).

IV

The Court of Appeals erred by holding in effect that the sentence imposed upon Petitioner does not constitute double punishment within the prohibition of the Fifth Amendment.

V

The Court of Appeals erred in not holding that the sentence imposed upon Petitioner constitutes a cruel and unusual punishment within the prohibition of the Eighth Amendment.

ARGUMENT

I

Petitioner's trial on the conspiracy charge, in the absence of two principal co-defendants, constituted a denial to him of due process.

Pleas of not guilty were entered by, or for, all of the defendants except Banning, who pleaded guilty and testified for the prosecution (R. 71, 161, 429). He had not yet been

sentenced (R. 162). Trial was set for February 6, 1946, and on January 23, 1946, a writ of *Habeas Corpus ad Prosequendum* was issued by the United States District Court for the Eastern District of Michigan, at the Government's instance (R. 52). It directed the Warden of the Ohio State Penitentiary to produce for trial defendants Graves and Sidran, who were incarcerated there under sentence for State offense (R. 52). As Federal Courts have no authority to issue writs of *Habeas Corpus* for service out of their respective jurisdictions, the above writ was clearly ineffective. *Jones* v. *Biddle,* 131 F. 2d 853, certiorari denied, 318 U. S. 784. The Warden declined to honor this writ (R. 52).

In the circumstances, the trial was postponed, and did not begin until May 6, 1946, ending in the conviction of Petitioner and Zussman (R. 48). Graves and Sidran were uninterruptedly absent from the trial (R. 52, 429).

The Trial Court charged that the Government's case stood or fell on Banning's testimony (R. 437); and the Court of Appeals has found that the conviction was based principally upon such testimony (R. 470). Banning at the time of the trial was not only a co-defendant, but was actually under Federal sentence of twenty years for conspiracy to rob, and a robbery, near Detroit on August 28, 1940 (R. 161, 162, 183). If his testimony, or any part of it, is to be believed, he, Petitioner, Graves and Sidran were the leaders in the instant conspiracy, Zussman's role being minor (R. 71-74, 91, 94), while Gridley was dismissed (R. 429). Banning knew before taking the witness stand herein that he would not have to face co-defendants Sidran and Graves (R. 172), and was aware that others named by him as his associates in the perpetration of jewel thefts were serving sentences, or were dead (R. 172, 241, 258). Petitioner and the other defendants did not testify (R. 437, 438). Accordingly, Banning was left fancy-free and uncontroverted at

the trial in the instant matter, and used the situation to the fullest, in pursuing the preconceived design of molding the two absent defendants and Petitioner into the alleged conspiracy (R. 240, 246, 247, 259, 263, 272).

Banning had previously informed interviewing Federal officials herein that he would designate Petitioner as "his fence" in robberies perpetrated by himself, Sidran, Graves and others (R. 257-263). The Government, not Petitioner, knew in advance the type of evidence which would be introduced in this conspiracy case (R. 163, 164, 178, 179, 243, 246, 247, 257). When the Warden declined to honor the void writ, he was acting lawfully, as the prosecution must have known. It was also known that the production of these two conspiracy defendants for the trial was important (R. 52, 72, 73, 76, 77). Notwithstanding, the record shows no step to procure their attendance, other than as above indicated—indeed shows no further step of any kind—despite the fact that three full months thereafter elapsed before the actual beginning of the trial (R. 52). In view of the importance of such aspect, why was the Government not more diligent? Why was the Warden's refusal accorded finality? Why were removal proceedings not instituted in Ohio? *McCarty* v. *United States District Court for the Western District of Arkansas*, 19 F. 2d 462. It was the prosecution's own duty to have all defendants present. Petitioner had no legal means for producing Sidran and Graves. It was the obligation of the prosecution, when advised as to the Warden's stand, to check their procedures, and to bring in these co-defendants for the trial under proper process. It can be presumed that the Government knew what would be the nature of any testimony which they might give at the trial, and as matters developed, the prosecution through its such dereliction was in effect enabled to obtain separate trials in this conspiracy case.

In conspiracy cases, the defendants should be tried together, because the act of one is that of all if the conspiracy is proved. *Stumbo* v. *United States,* 90 F. 2d 828, certiorari denied, 58 S. Ct. 282. The Federal Courts do not look with favor upon separate trial in conspiracy cases, because of their very nature. *Dowdy* v. *United States,* 46 Fed. 2d 417, 421 (C. C. A. 4); *United States* v. *Gilbert,* 31 Fed. Supp. 195.

In March, 1947, Sidran and Graves, still in the Ohio State Penitentiary, gave affidavits, stating that they had no knowledge of date set for trial under the indictments, and learned of the beginning of the trial only from press reports, and that if they had been present, they would have testified in direct refutation of Banning's testimony. Petitioner's appeal was then pending in the Court of Appeals. Upon the basis of these affidavits, he moved to suspend the appellate proceedings and to remand the cause to the District Court, the motion being denied.

Accordingly, the Court of Appeals erred in holding that the Government took all available steps to insure the presence of co-defendants Sidran and Graves at the trial (R. 478), and erred in holding that since no authority could compel them to be present, the proceedings in this respect were not unfair (R. 478). All available steps to insure their presence were not taken, the procedure provided under Section 591, Title 18 not having been utilized. And the failure of the Government to produce these two principal co-defendants for the trial was highly prejudicial to Petitioner, and resulted in a denial to him of fair trial, and of the due process guaranteed under the Fifth Amendment. *Baker* v. *Hudspeth,* 129 F. 2d 779, certiorari denied, 63 S. Ct. 201; *United States ex rel. Innes* v. *Hiatt,* 141 F. 2d 664; *Miller* v. *United States,* 120 F. 2d 968. And this Court may take full cognizance of the plain error such as occurred here. *United Brotherhood, etc.* v. *United States,* 67 S. Ct. 775, 784 (1947);

United States v. *Atkinson*, 56 S. Ct. 391; *Weems* v. *United States*, 30 S. Ct. 544; *United States* v. *Modern Reed and Rattan Company*, 159 F. 2d 656; *Schwartz* v. *United States*, 10 F. 2d 900, 901.

Subsequent to the conclusion of Petitioner's trial, and on May 31, 1947, Banning was granted a pardon from his aforementioned sentence of twenty years imprisonment. Some time also subsequent to such conclusion, he was given a suspended sentence in the instant matter.

II

There should be a determination as to the scope of applicability of Section 591, Title 18, United States Code (Section 1014, Revised Statutes), in view of its lack of clarity, and conflicting interpretations.

The above section provides:

> "For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any United States Commissioner, or by any Chancellor, Judge of a Supreme or Superior Court, chief or first Judge of Common Pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such Court of the United States as by law has cognizance of the offense. * * * Where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warant for his removal to the district where the trial is to be had."

In connection with the issue of fair trial (Point I hereinabove), Petitioner contended in the Court of Appeals that

removal proceedings, under the foregoing Statute, constituted the proper procedure to assure the presence of co-defendants Sidran and Graves at the trial, and that such procedure was ignored. The Government contended, on the other hand, that such procedure could not be invoked if the defendant were wanted by the State having current custody, because removal, if ordered, implies the right to exercise jurisdiction to its exhaustion—that where one charged or indicted in a judicial district is incarcerated under a State sentence, the Government can accomplish his appearance in the trial Court only by writ of *habeas corpus ad prosequendum,* the use of which rests upon the principle of comity between the Government and the States.

The Court of Appeals held that there is no express authority authorizing the transfer of a prisoner, held under a judgment of conviction in a State Court, to a Federal Court for trial upon a Federal charge; that the Government took all available steps to insure the presence of Sidran and Graves at the trial, but that since no authority could compel them to be present, the proceedings in this respect were not unfair (R. 478).

That the foregoing ruling is incorrect becomes apparent from the phraseology of the concluding sentence in the above-quoted statute. Petitioner contends that in the circumstances the United States Attorney should have appeared before the United States District Court at Columbus, Ohio, which had the authority to issue a warrant for the removal of co-defendants Sidran and Graves, then confined in the Ohio State Penitentiary there, for production in the United States District Court at Detroit where their "trial was to be held." The procedure which was actually followed, namely, securing the issuance of a writ of *habeas corpus ad prosequendum* by the United States District Court at Detroit for purported service upon the warden of

the Ohio State Penitentiary, was obviously ineffective, and the writ a nullity, as the Court had no authority to issue a writ of *habeas corpus* to be sent out of its jurisdiction, the applicability of such process being restricted to the territorial jurisdiction of the Court issuing it. *Jones* v. *Biddle*, 131 F. 2d 853, C. C. A. 8 (1942), certiorari denied. 318 U. S. 784.

The United States Court of Appeals for the Eighth Circuit stated in *McCarty* v. *United States District Court for the Western District of Arkansas*, 19 F. 2d 462:

> "Where a person is serving a sentence in a Federal penitentiary *in the same judicial district* where the indictment is pending against him under which he demands trial, it would seem that a writ of habeas corpus ad prosequendum under Section 753 Revised Statutes (Cong. St. # 1281) would answer; where the removal is necessary from one district to another, Section 1014, Revised Statutes (Cong. St. # 1674) might be invoked. See *Ponzi* v. *Fessenden, supra*, page 261 (42 S. Ct. 309)." (Italics ours.)

And in *United States ex rel. Coleman* v. *Cox, District Judge*, 47 F. 2d 988, the United States Court of Appeals for the Third Circuit observed:

> "The right guaranteed to a defendant to have a speedy trial is not lost to him or in any substantial way abridged because of his being confined in a penitentiary . . . Whatever the form the relief should take, whether through the issuance by the Court of indictment of a writ of habeas corpus ad prosequendum under Section 753 R. S. (28 U. S. C. A. # 453), or through removal proceedings under Section 1014 R. S. (18 U. S. C. A. # 591), it is plain that applicant has a right of such substantiality as that no dry or technical standing upon the form of procedure should stand in the way of its granting . . ."

It is stated in *Cyclopedia of Federal Procedure*, 2nd Edition, Callaghan and Company (1943), Vol. 9, Section 3906:

> "The so-called 'removal statute', familiarly known as Section 1014 of the Revised Statutes, which governs removal proceedings, is rather lengthy and not as clear and understandable as might be desired. It first names the judges, officers, etc., who may act in regard to arrest or bail, and while certain state judges and officers are enumerated therein, it seems that the application is never made to such judges or officers, so that for practical purposes, the only judges or officers provided for to act are (1) any justice or judge of the United States, and (2) any United States Commissioner . . ."

In view of the lack of clarity, or misapprehensions, as to the scope of applicability of this important Act, and inconsistent interpretations by United States Courts of Appeals, there should be a construction by this Court.

III

The question as to the standard or measure for arriving at value under Section 415, Title 18, United States Code, is of far-reaching importance, requiring this Court's review and determination.

Aforementioned Section 415 provides:

> "Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or moneys of the value of $5,000 or more theretofore stolen, feloniously converted, or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen, feloniously converted, or taken, . . . shall be punished by a fine of not more than $10,000 or by imprisonment for not more than ten years, or both. . . ."

The salesman from whom the goods here were stolen, died before trial (R. 250). It was shown that on setting out from

New York City on his sales trip, he possessed a line of watch samples—some complete watches—others dummies (cases without works) to show to the retail trade, and to take orders on them (R. 205, 211, 213, 216, 219). Following the larceny, and before any interstate transportation, the thieves threw away part of the merchandise and burned it, the firemen finding small pieces of jewelry, a lady's wrist watch, and portions of jewelry sample-cases containing trays of watches partially burned (R. 286-288). Full insurance settlement of $4,600 was accepted by the watch company (R. 9, 474).

The stolen cases were not to be sold to any retail jeweler for resale, and were not of value to any other manufacturer, being of the exclusive design of this company (R. 219). The cases were used solely as samples in the soliciting of orders thereon, and had themselves no exchange value (R. 205, 210). The Government's testimony itself showed that the merchandise was not designed for sale (R. 210, 219).

As the settlement of $4,600 was insufficient under the Statute, evidence was permitted, over objection, of a mark-up in the retail trade of between 50 and 60 per cent. The prosecution also presented evidence of prices to the ultimate consumer (R. 474), who would hardly be interested in empty watch cases. The aggregate value figure was by such a method finally brought above the statutory minimum. Petitioner contended that it was impossible under the admitted facts to establish a market value for these goods, either retail or wholesale, because they were not to be sold, and because no wholesale jeweler or retail jeweler, or ultimate consumer would buy them, being goods none of them could use. However, in admitting evidence of retail value, the Trial Court relied upon *Husten* v. *United States*, 95 F. 2d 168, C. C. A. 8, and the Court of Appeals approved, saying:

"It was proper to receive in evidence testimony as to the retail value of these items" (R. 474).

What does the jurisdictional term "value of $5,000 or more" in the statute mean? No standard of determination is set forth therein.

As was done in the case at bar, can property without any market or exchange value be, nevertheless, judicially endowed with the same? *Is this jurisdictional requirement of "value of $5,000 or more" of such elasticity as to permit varying standards, or none at all, for its establishment?*

In *Reynolds* v. *United States,* 152 F. 2d 586, C.C.A. 5 (1945), certiorari denied, 66 S. Ct. 959, it was held that under Section 415 the value of the transported property was measured by "its fair market value." In *United States* v. *Garvey, et al.,* 150 Fed. 2d 767, C.C.A. 2 (1945), proof of value was by the testimony of witnesses, shown to be familiar with the goods of the kind mentioned in the manufacturer's invoices accompanying the stolen goods, that the prices at which the goods had been so invoiced by the manufacturer were reasonable. In *Petrilli* v. *United States,* 129 F. 2d 101, C.C.A. 8 (1942), evidence was presented to show a wholesale market value of approximately $13,000. It was held in *Backun* v. *United States,* 112 F. 2d 635, C.C.A. 4 (1940), that there must be substantial evidence that the stolen property transported was of the required value.

In *Husten* v. *United States, supra,* the "rings were of the same character and quality as those sold to the jewelers upon them as samples," and had an individual retail market value, the entire lot being susceptible of valuation as such; and it was held that in such circumstances the retail value should prevail over the wholesale or replacement value. In a strongly worded dissent, Judge Woodrough asserted that the use of "retail market value" under the

Act gives a fictitious value, and erroneously expands the jurisdiction under the Act, which would become more obvious when the standard is applied to evaluate "sacks of coffee, or cases of cigarettes, or hogsheads of beer, or bundles of pelts, or casks of rum, or any of a thousand things which like jewelry fetch a great price in broken bulk and costly setting over the retail counter." He observed that the criterion of evaluation should be the same as for measuring damages in civil suits, the question of value under the aforementioned Act being characterized by him in his dissent as a matter of "far-reaching importance." Counsel for Petitioner respectfully agree.

The foregoing cited cases appear to be the only decisions of United States Courts of Appeals touching upon the matter of measure of value under this statute, and, as noted, they are divergent, and fail to set forth any standard for the establishment of this jurisdictional prerequisite. Accordingly, the question requires this Court's review and determination.

IV

The sentence imposed upon Petitioner constitutes double punishment within the prohibition of the Fifth Amendment.

The evidence does not show, nor was it alleged (R. 1-6), or found (R. 470-478), that Petitioner was in Detroit on or about December 13, 1940. Hence, he could not have participated in the actual robbery at the Book-Cadillac Hotel on that day. Indeed, knowledge of such robbery, according to the Government witness Banning, came to Petitioner for the first time in Chicago, after Sidran, Graves, and Banning had completed transportation to that city from Detroit (R. 74-6, 92).

The ruling of the Court of Appeals, holding that the substantive offense count was properly submitted to the jury,

appears to have been based upon *Pinkerton* v. *United States,* 328 U. S. 640 (R. 476, 477). There, Mr. Justice Douglas, speaking for the majority, stated in conclusion (R. 647, 648):

> "A different case would arise if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement. . . ."

The application to the cause at bar of the principle announced in the *Pinkerton* decision, ignores those portions of the record herein which disclose that Petitioner was asserted to have been no more than a "fence" for the stolen goods (R. 86, 87, 233, 317, 324, 325). One who occupies such a position is an accessory after the fact, and therefore not properly chargeable as a principal under the aider and abettor statute. *Bollenbach* v. *United States,* 326 U. S. 607, 611, 90 L. Ed. 350; *Morei* v. *United States,* 127 F. 2d 827 C.C.A. 6.

Other and specific statutory enactment exists, prohibiting the criminal conduct asserted against this Petitioner. Section 416, Title 18, United States Code.

If sanction is given to the contention that once Petitioner's participation in the conspiracy charged had been established, he could be accused of, and punished for, each substantive offense committed by any member of the conspiracy, then a rule of law would stand as established extending multiple punishments to unreasonable and limitless proportions at the whim of prosecuting officials.

It is also important to note that the application of any such doctrine ignores the distinction between the crime of conspiracy and the violation of a substantive law. *Free-*

man v. *United States*, C.C.A. 6, 146 F. 2d 978 (1945) citing *Gavieres* v. *United States*, 220 U. S. 338, 343, 55 L. Ed. 489, 31 S. Ct. 421. Indeed, in the cause at bar there is presented a situation, in all its elements, warned against in the dissenting opinion of Mr. Justice Rutledge in *Pinkerton* v. *United States, supra*, page 650:

> "If the matter is not generally of constitutional proportions, it is one for the exercise of this Court's supervisory power over the modes of conducting Federal criminal prosecutions within the rule of *McNabb* v. *United States*, 318 U. S. 332, 87 L. Ed. 819, 63 S. Ct. 608."

The Fifth Amendment protects all against double punishment. Its enforcement and its application demand a test which is a practical, not a theoretical one. It is the evidence, and not the theory of the pleader, to which we must look to determine the issue. *Murphy* v. *United States*, 285 Fed. 801, 817, C. C. A. 7.

In the light of the record here presented, it is respectfully urged the sentence imposed upon Petitioner constitutes double punishment within the prohibition of the Fifth Amendment.

V

The sentence imposed upon Petitioner constitutes a cruel and unusual punishment within the prohibition of the Eighth Amendment.

Section 415, Title 18, United States Code, provides a fine of not more than $10,000, or imprisonment for not more than ten years, or both, for the substantive offense thereunder. Section 418a provides for punishment in like manner for conspiracy to violate any provision of Sections 413-419 of the above Title. It may be noted that the maximum punishment under the general conspiracy statute (Title 18, Section 88) is two years and $10,000 fine.

In its charge, the Trial Court expressed the belief that the "Government's case must rest or fall on Banning, all of it" (R. 437). The Court of Appeals found that "the conviction was based principally upon the testimony of Herman Frank Banning, a co-defendant under the indictment" (R. 470). Not only was Banning a co-defendant but he was then under Federal sentence of twenty years for conspiracy to rob, and a robbery, near Detroit, on August 28, 1940, and had a long and lurid criminal career (R. 71, 73, 161, 165, 167, 170-1, 200-4, 223, 280). Without doubt, he was passing over to the Government, as he had stated, "some consideration by way of talking" in the hope of securing relief from his then existing heavy sentence (R. 181). He himself had been previously convicted in this United States District Court for the Eastern District of Michigan in connection with the aforementioned conspiracy to rob, and robbery, near Detroit on August 28, 1940, principally on the testimony of accomplice, and convict, Frank McMann (R. 183, 272), the Court of Appeals thereafter affirming (130 F. 2d 330). In fact, Banning asserted upon the trial in the instant case that he was not near Detroit but was in Ohio, on the very date of the crime for which he was then under sentence, and was innocent of that crime (R. 223, 272). In testifying herein against Petitioner, Banning merely emulated the example of his mentor, aforementioned McMann (R. 183, 272), and his testimony is not more worthy. Indeed, the jury was charged to scrutinize his testimony very carefully (R. 436), and in the circumstances, the verdict of guilty was necessarily grounded on testimony of most dubious quality. Nevertheless, the Court sentenced Petitioner, not to any term moderately within the statutory limits, but to the very maximum—twenty years and $20,000, all for an alleged offense in connection with property worth $4,600, or less.

Despite the grave responsibility entailed, the Court took

little or no time for reflection and consideration, or possibly for consultation with probation or other officials, usually done by Courts before pronouncing sentence, but acted precipitately when the verdict was rendered—on the same day (R. 50, 51)—and this against a man of no prior criminal convictions whatsoever, to whom at the age of 57 the sentence of twenty years imprisonment is one of death.

Under the authority of the Eighth Amendment, Courts may hold as unconstitutional punishments, legislatively provided, which are unduly severe. *Weems* v. *United States*, 217 U. S. 349. In the circumstances herein, this ill-considered and intemperate sentence constitutes a cruel and unusual punishment within the prohibition of that Amendment.

Conclusion

WHEREFORE, it is submitted that the Petition for Writ of Certiorari should be granted.

JOHN WATTAWA,
DONALD B. FREDERICK,
Counsel for Petitioner.

(4911)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 602

MEYER GORDON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

REPLY BRIEF FOR PETITIONER

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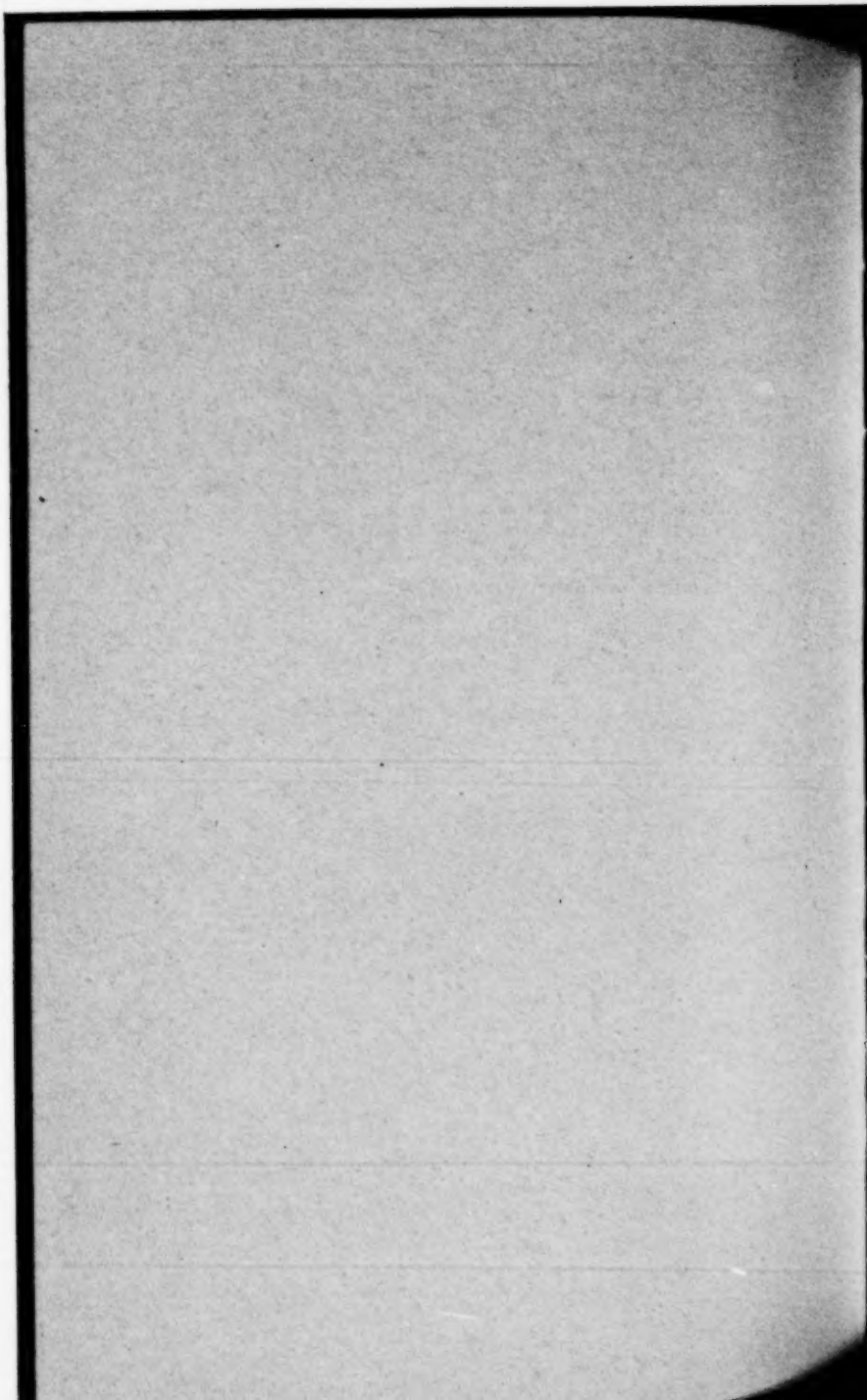

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 602

MEYER GORDON,

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REPLY BRIEF FOR PETITIONER

Questions Presented

Under this heading, at its page 2, the Government seeks to combine Petitioner's Questions Presented I and II (Pet. 2), into a single Question Presented, purporting to deal restrictively with the subject of reversible error as on an appeal.

However, Petitioner's Question Presented I (Pet. 2) is much broader in scope, and is of fundamental significance, dealing, as it does, with denial of due process under the Fifth Amendment by reason of the circumstances presented, and hence cognizable on this Petition.

Petitioner's Question Presented II (Pet. 2) is also of fundamental significance, independently so, involving the consideration and interpretation of the so-called removal

statute, and the issue of efficacy, or supremacy, of Federal process, in the circumstances presented, and hence also cognizable on this Petition.

Nor does Petitioner merely request, as the Government infers (Page 2), a reviewal of the evidence as such, as on a motion for a new trial, to determine whether it was sufficient to support a finding that the property allegedly transported had a value of $5,000 or more. What Petitioner does seek here (Question Presented III, Pet. 2) is a ruling as to the standard, for jurisdictional purposes, to be applied in determining "value of $5,000 or more" in Section 415, National Stolen Property Act (Title 18, United States Code, Sections 413-19). Such issue is of far-reaching importance, its determination being vital for the guidance of the law enforcement agencies, both Federal and State, and of the Courts. This Court has not yet ruled, and the opinions of the Courts of Appeals are divergent (Petitioner's Brief 23), and fail to set forth any standard.

Statement of the Case

On its page 5, the Government states that its chief witness Banning testified that he and his colleagues always sold the jewelry to Petitioner. But the Government omits to mention the statement contained in a letter which Banning on June 27, 1943, wrote to his wife that "Abie Ginsberg from Minneapolis . . . was my fence, and they tell me he is dead, died about six months ago . . ." (R. 243).

At the bottom of its page 5, and top of its page 6, the Government presents a lengthy and irrelevant excerpt from the opinion of the Court of Appeals, as a part of its statement of facts, although the Transcript of Record, containing the evidence, is before this Court.

On its page 6 the Government states that "pursuant to agreement on September 7, 1,940 (R. 72), Banning, Sidran, and Graves went from Chicago to Detroit to search for a

jewelry salesman to rob." But the Government omits to add that the evidence further shows that such agreement was made by, and limited to, those three individuals (R. 72-77), Banning stating that "the three of us were sort of in conspiracy, I suppose, to come to Detroit" (R. 75).

Further, on its page 7, the Government asserts that Banning, Sidran, and Graves "met in Chicago the next morning, when the jewelry was shown and sold to Petitioner by Banning, Sidran and Graves in Banning's hotel room." But such statement is incomplete, and also incorrect, because Banning also testified that he did not deliver the merchandise to Petitioner (R. 94), and he could not say that it had been delivered to him (R. 94), and there is no evidence showing any such delivery.

Argument

1. The Government asserts, page 9, that it did everything within its power to secure the presence of Sidran and Graves at the trial, by obtaining writ of *habeas corpus ad prosequendum* from the United States District Court for the Eastern District of Michigan. But such assertion is not responsive, because that is precisely one of the issues presented here (Pet. 2, 7, 8, 18-21).

The Government asserts further at this point that there was no legal procedure available for compelling the officers of the State of Ohio to honor the second writ of *habeas corpus ad prosequendum*. Petitioner has already asserted (Pet. 19, 20) that such writ was a legal nullity and ineffective, and it naturally follows that its honoring was not compellable.

Ponzi v. *Fessenden*, 258 U. S. 254, cited Government's Brief 7, is authority for the proposition that under the principle of comity, the Federal Government may permit the transfer of a prisoner from Federal to State jurisdiction for trial under an indictment. The decision does not

appear to go further than that. Therefore, it is without relevancy here except as it confirms that "the penitentiary is not a place of sanctuary; and an incarcerated convict ought not to enjoy an immunity from trial merely because he is undergoing punishment on some earlier judgment of guilt" (264).

In its first paragraph, page 10, the Government asserts, without authority citation, that the removal statute would have been available "only if the defendants were made amenable to the process of the Federal District Court in Ohio," and that such statute "makes no provision for release of persons from State to Federal custody." These statements are not responsive, in addition to being not clear, because it is the *scope of applicability of the removal statute* which is precisely in issue here also (Pet. 2, 7, 8, 13, 14, 18-21).

2. It is not correct, as asserted Government's page 10, that Petitioner does not question the sufficiency of the evidence to sustain his conviction for conspiracy. The fact is that issues submitted herein by Petitioner are of basic and far-reaching character, affecting and negating the evidence as a whole.

Nor is it correct, as asserted further Government's page 10, that there can be no doubt that the substantive offense was committed by the co-conspirators, in furtherance of the conspiracy. As previously observed (Pet. 24), the evidence does not show, nor is it alleged (R. 1-6), nor found (R. 470-78), that Petitioner was in Detroit at the time of the robbery. Knowledge of the latter, according to chief Government witness Banning, came to Petitioner for the first time in Chicago, after Sidran, Graves, and Banning had completed transportation to that city from Detroit (R. 74-6, 92). Moreover, as stated hereinabove, Banning testified that he did not deliver the merchandise to Peti-

tioner (R. 94), and could not say that it had been delivered to him (R. 94), and there was no evidence showing any such delivery. Accordingly, no evidence exists connecting Petitioner with the substantive offense—a fact impliedly recognized by the Court of Appeals, when, after announcing (3rd and 4th lines, R. 474) that it would later discuss the substantial evidence requiring submission to the jury under the substantive count, thereafter made no such discussion at all (R. 474-8), and indeed could not, because of the utter absence of such evidence. Therefore, *Pinkerton* v. *United States,* 328 U. S. 640, cited by the Government (11), is inapplicable, rendering the sentence imposed a double punishment.

3. As to the question of the value of the stolen property, facts which indisputably emerge are that (a) *full insurance of $4,600, based on cost or inventory, was determined, paid, and accepted for the loss* (R. 62, 209, 210); (b) *the property comprised sample watch cases made of base metal, some with works, others empty, used exclusively as samples in the soliciting of orders, and admittedly non-marketable* (R. 219; Government's Brief 13); (c) *a portion of the merchandise was, before any transportation, destroyed by a fire which apparently lasted several hours* (Government's Brief 7).

Accordingly, it was fundamental error to admit any evidence at all relating to a hypothetical retail value; and any discussion touching upon a purported retail value is irrelevant in view of the issues on this Petition, and is an avoidance of Question Presented III (Pet. 2). It is unquestioned that the maximum civil liability was determined, and recognized, at $4,600, and an entirely different and broader measure of value, based largely on conjectures, certainly should not be permitted to prevail for the purposes of a criminal prosecution.

Indeed, under the prosecution's reasoning, where gray or black markets actually exist supporting prices in excess

of those in the normal, or nominal, retail markets, a contention could even be asserted that the prices in such gray or black markets should control, as being more nearly representative of ultimate consumer values, thereby still further erroneously expanding the jurisdiction under the National Stolen Property Act.

4. The several authorities cited by the Government (16, 17) in support of its position that the sentence imposed does not warrant review, are all decisions of Courts of Appeals. From the citations in their respective texts, each appears as relying upon its predecessor, so that in effect they constitute only one independent decision. It does not appear that this Court has passed upon the general proposition here involved, other than to the extent appearing in *Weems* v. *United States,* 217 U. S. 349 (1910), making desirable a current, and perhaps more precise, determination.

For the reasons stated Petitioner's Brief (26, 27, 28), and appearing on the record, it is respectfully submitted that the imposition of the maximum sentence on each of the two counts, to run consecutively, is a gross and palpable abuse of discretion within the exception of the authorities cited by the Government, pages 16 and 17. As observed Petitioner's brief (27), the Record shows that sentence was imposed on the same day the verdict was rendered (R. 50, 51). But in actuality, with an impetuousness believed seldom paralleled under like circumstances in American jurisprudence, this inordinately harsh sentence was imposed within a very few minutes after such verdict, immediately following the jury's departure from the courtroom.

Banning Sequel

The Court of Appeals has found (R. 470), as is the fact, that Petitioner's "conviction was based principally upon the testimony of Herman Frank Banning, a co-defendant

under the indictment," and in its opinion cites liberally from such testimony (R. 470-2). The Government's brief admits (4, 5) that Banning was "the chief witness at the trial", and its Statement, at pages 5, 6, and 7, is comprised almost entirely of excerpts from his testimony, or of Court of Appeals findings predicated upon such testimony.

Banning was not only a co-defendant under the indictment, but is an ex-convict of long and vicious criminal career (R. 71, 72, 161, 165, 167, 170, 171, 200-4, 223), and at the time of his testimony was actually serving Federal sentence of 20 years (R. 161, 162, 183).

It will be recalled that subsequent to the conclusion of the trial herein, and on May 31, 1947, Banning was granted a pardon from the aforementioned Federal sentence of 20 years (Pet. 6; Brief 18). Sometime also subsequent to such conclusion, he was given a suspended sentence in the instant matter (Pet. 6; Brief 18). In testifying against Petitioner, Banning's sole motive apparently was to extricate himself from his desperate predicament, and he obviously cared little whether his testimony was true or not, so long as it served the purpose of liberating him. That purpose was achieved.

As further and conclusive indication of the thorough moral unreliability of this man, the Court's attention is invited to the fact that subsequent to the filing of this Petition for Certiorari, and on February 20, 1948, Banning and one Gizzi jointly held up and robbed two gasoline filling stations in Detroit, Michigan; that in endeavoring to escape after the second holdup, Banning and his confederate, from an automobile operated at high speed, engaged in a running gun battle with police for a distance of five miles in the side streets of Detroit, Banning very seriously wounding a Detroit policeman, and being himself also later wounded, and captured. In commenting, the Detroit press has carried

reports of admissions from official sources that Banning had been permitted to remain free because of the use to which he lent himself in connection with this proceeding against Petitioner, which reports have not been denied.

And so upon the self-fulfilling emanations of one so debased, uttered at this conspiracy trial, with two principal co-defendants who would have refuted them not produced, Petitioner, clean of any prior convictions, finds himself condemned to a sentence of punishment which in actual effect is not less than capital.

WHEREFORE, it is earnestly urged that this Petition for Certiorari should be granted.

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(5317)

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 602

MEYER GORDON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 470–478) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered on December 8, 1947 (R. 469), and a petition for rehearing (R. 479–493) was denied on January 19, 1948 (R. 495). The petition for a writ of certiorari was filed on February 17, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether it was reversible error to try petitioner and two codefendants on charges of conspiracy to violate the National Stolen Property Act and of a substantive violation thereof without the presence of two other codefendants who were in the custody of state officials who refused to deliver them for trial in the federal district court pursuant to a writ of habeas corpus ad prosequendum issued by that court.

2. Whether the trial court erred in submitting to the jury the issue of petitioner's guilt on the substantive count and in imposing a separate sentence on that count.

3. Whether there was sufficient evidence to support a finding that the stolen property transported from Detroit to Chicago on September 13, 1940, had a value of $5,000 or more.

4. Whether the imposition of the maximum sentence on each of the two counts amounted to "cruel and unusual punishment."

STATUTE INVOLVED

The National Stolen Property Act, as amended, 48 Stat. 794, 53 Stat. 1178, provides in pertinent part:

> Sec. 3 [18 U. S. C. 415]. Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the

value of $5,000 or more theretofore stolen, feloniously converted, or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen, feloniously converted, or taken, * * * shall be punished by a fine of not more than $10,000 or by imprisonment for not more than ten years, or both: * * *.

Sec. 7 [18 U. S. C. 418a]. If two or more persons enter into an agreement, confederation, or conspiracy to violate any provision of this Act, and do any overt act toward carrying out such unlawful agreement, confederation, or conspiracy, such person or persons shall be punished in like manner as hereinbefore provided by this Act.

STATEMENT

On September 11, 1943, in the District Court for the Eastern District of Michigan, petitioner was jointly indicted with Herman Frank Banning, Bernard Sidran, Howard Julian Graves, Abe Zussman and Bernard F. Gridley for violation of the National Stolen Property Act and for conspiracy to commit offenses under that Act (R. 1–6).

Banning pleaded guilty (R. 162). Petitioner, Zussman and Gridley pleaded not guilty (R. 7–8). Sidran and Graves were at the time incarcerated in the Ohio State Penitentiary, but, pursuant to writ of habeas corpus ad prosequendum issued by the district court. they were produced by the Ohio

officials and arraigned on February 28, 1944. Pleas of not guilty were entered on their behalf (Pet. 4–5).[1]

The trial was held in May 1946 (R. 48). At that time Sidran and Graves were still confined in the Ohio State Penitentiary and the warden of that institution refused to deliver them to the custody of the United States pursuant to a second writ of habeas corpus ad prosequendum issued by the district court (R. 52). The trial proceeded without them.

At the close of the evidence, the trial court dismissed the action as to Gridley (R. 410). The jury returned verdicts of guilty against Zussman and petitioner on both counts (R. 48). Petitioner was sentenced to imprisonment for ten years and fined $10,000 on each count, the terms to run consecutively (R. 50–51). On appeal, the circuit court of appeals affirmed petitioner's conviction (R. 469).

The first count of the indictment charged a conspiracy from January 1, 1940, through May 1, 1941, to transport stolen jewelry valued at $5,000 or more from various points in the United States to Chicago, Illinois (R. 1–5). Banning, the chief

[1] This fact does not appear in the record before this Court. The facts as to the proceedings against Sidran and Graves appear in connection with a motion for remand to the district court made by petitioner in the course of the circuit court of appeals proceeding, referred to by petitioner (Pet. 6).

witness at the trial,[2] testified that he met petitioner in 1935, at which time petitioner advanced money to be used by Banning and his associates, including Graves, for expenses in connection with trips made for the purpose of stealing jewelry (R. 102–103). On other occasions thereafter petitioner advanced funds to Banning and Graves for such expenses (R. 116). Over a period of years prior to 1941, Banning and several associates engaged in approximately twenty-five jewel robberies (R. 76, 197), several of which were described by Banning at the trial (e. g., R. 103, 109, 111, 115, 117, 120, 121, 130, 136, 144). The jewelry stolen on these occasions was transported to Illinois, usually Chicago, where it was sold to petitioner (R. 106, 110, 114, 116, 118, 121, 134, 141, 145). Banning testified that he and his colleagues always sold the jewelry they stole to petitioner (R. 86–87). In buying such jewelry, petitioner knew it was stolen, and the facts concerning the thefts (R. 147). The court below has described the pattern of the thefts as follows (R. 471–472):[3]

> The method which Banning and his confederates followed in the robberies was to hunt for and get on the track of some jewelry salesman whom they would follow from

[2] Banning's testimony was corroborated in many respects. Cf. opinion of the court below, R. 474–476.

[3] Petitioner has not questioned the court's statement of facts.

> place to place and from city to city. They would ascertain whether this salesman carried his samples or wares in a trunk or on his person. If on his person, they followed him until they were able to hold him up and take the jewelry. If a jewelry trunk was used, they watched the expressman who was conveying the trunk to or from the station and would either steal it at a time when the expressman was occupied, or hold him up at the point of a pistol and take the trunk. Sometimes they followed the automobiles of jewelry salesmen, blocked the road, forced them to stop, and robbed them.

The second count of the indictment charged the transportation of stolen jewelry of a value of more than $5,000 from Detroit, Michigan, to Chicago, Illinois (R. 6). Pursuant to agreement, on September 7, 1940 (R. 72), Banning, Sidran and Graves went from Chicago to Detroit in search of a jewelry salesman to rob (R. 75–76). They found one on the streets of Detroit (R. 79) and followed him to his room in the Book-Cadillac Hotel (R. 79–80). It was then decided to include another person, defendant Zussman, in the transaction for the purpose of securing a key to the jewelry salesman's hotel room (R. 80). On September 13, 1940, Zussman secured the key from Gridley, a bellboy in the hotel (R. 80–81). Sidran, Graves and Banning then entered the room by means of the key and stole two sample cases

and a brief case containing jewelry (R. 81–82). They and Zussman were all armed (R. 82–83). They separated outside the hotel but later all met at Sidran's home in Detroit (R. 83), where they transferred the jewelry from the two sample cases to the brief case (R. 84). Later they burned the sample cases containing the cardboards on which the jewelry had been mounted on a country road on the outskirts of Detroit (R. 89). Several hours later the fire was reported to the fire department (R. 285). Policemen and firemen who went to the scene of the fire found the burning sample cases and some small pieces of jewelry (R. 285–289). By agreement among the thieves (R. 86), Graves took the stolen jewelry from Detroit to Chicago, and the other three proceeded to Chicago by another automobile (R. 89). They met in Chicago the next morning, when the jewelry was shown and sold to petitioner by Banning, Sidran and Graves in Banning's hotel room (R. 91–92).

ARGUMENT

1. Petitioner urges that the entire trial was unfair because his codefendants Graves and Sidran were not present.

At the opening of the trial on May 6, 1946, before the jury was drawn, the attorney for the Government stated that Sidran and Graves were incarcerated in the Ohio State Penitentiary, and that on petition of the prosecution the United

States District Court had issued a writ of habeas corpus ad prosequendum to the warden of the Ohio State Penitentiary, but that the state official had refused to deliver them up for trial in the present proceeding (R. 52, 478). No objection to proceeding with the trial was made by petitioner at that time or at any other point in the course of the trial.[4] It was not until March 1947, when the case was pending in the circuit court of appeals, that petitioner raised any question as to the procedure followed. At that time he filed a motion to suspend the appellate proceedings and to remand the case to the district court for the purpose of entertaining a motion for new trial (Pet. 6). The circuit court of appeals denied the motion. Petitioner does not seek to have the denial of this motion reviewed; nor has he presented to this Court any facts on which such review could be had.

Although petitioner alleges that Sidran and Graves would have testified in refutation of Banning had they been present at the trial (Pet. 6, 17), we submit that, since they were defendants,

[4] The trial had been set for February 6, 1946, and prior thereto, on January 23, the Government had secured a writ for the production of Graves and Sidran. The Ohio officials declined to produce them and the trial was postponed (see Pet. 15). There is no indication that petitioner made any effort to interview the prisoners or secure their affidavits or depositions in the meantime. Apparently, not until March 1947, while the appeal was pending, was any attempt made to interview Graves and Sidran (see Pet. 17).

there is no assurance, or even probability, that they would have taken the stand.[5] None of the three defendants who were tried did take the stand, nor did they present any other evidence in their defense. Although Banning was the chief witness at the trial, as the court below pointed out (R. 474–476), his testimony was corroborated in a great many respects. It is evident, therefore, that the trial court in no way erred in proceeding with the trial without the presence of Sidran and Graves, particularly in the absence of any objection by petitioner.

As the circuit court of appeals pointed out in its opinion, the Government did everything within its power to secure the presence of Sidran and Graves at the trial (R. 478). Twice writs of habeas corpus ad prosequendum were secured (Pet. 4–5). There was no legal procedure available for compelling the officers of the State of Ohio to honor the second writ since the transfer of prisoners between federal and state custody is a matter simply of comity. *Ponzi* v. *Fessenden*, 258 U. S. 254.

[5] In affidavits attached to the motion for a remand filed in the circuit court of appeals, Graves and Sidran stated that had they been present at the trial they would have testified in contradiction of Banning (see Pet. 17). The affidavits, however, were executed about ten months after the trial, and obviously have little probative value. The circuit court of appeals in denying the motion for a remand had before it the motion and all the papers attached.

Petitioner has suggested that the prosecution might have sought to use the machinery established under the federal removal statute* (Pet. 7–8, 18–21). That statute, however, on its face, would have been available only if the defendants were made amenable to the process of the federal district court in Ohio. It, of course, makes no provision for release of persons from state to federal custody. It therefore would not have obviated the difficulty encountered in the use of a writ of habeas corpus and prosequendum.

2. Petitioner argues (Pet. 10, 24–25) that since he was not shown to have had any direct, personal participation, except as a "fence", in the substantive offense, he could not be held responsible as a principal to that crime. He does not, however, question the sufficiency of the evidence to sustain his conviction for conspiracy. And there can be no doubt that the substantive offense was committed by the co-conspirators in furtherance of the conspiracy. The factual details of the offense (R. 72–94) were entirely similar to those of numerous others testified to by Banning. This offense fell

* "* * * Where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had." 18 U. S. C. 591. See also Rule 40 of the present Federal Rules of Criminal Procedure governing removal.

exactly within the long established pattern of the conspirators described by the court below (R. 471–472, quoted *supra*, pp. 5–6). In view of the extensive history of similar acts in the course of the conspiracy, this offense was clearly one which petitioner could reasonably have foreseen "as a necessary or natural consequence of the unlawful agreement." *Pinkerton* v. *United States*, 328 U. S. 640, 648 (Cf. Pet. 25).

Petitioner's argument is foreclosed by the *Pinkerton* decision, where it was held, on facts not differing in any material respect from those in the instant case, that a member of a conspiracy who has not withdrawn therefrom is guilty of all offenses committed by any member of the conspiracy in furtherance of the illegal agreement (pp. 646–647). The Court in that case (at p. 643) expressly rejected the contention made here by petitioner that conviction under such circumstances of both the conspiracy and the substantive offense constitutes double jeopardy.

3. The undisputed evidence was sufficient to warrant a finding that the stolen property had a value of $5,000 or more. The cost of the jewelry to the robbery victim, a wholesale seller of jewelry, was $6,190.50 (R. 211). The company's insurance claim for $6,190.50 was settled for $4,600 (R. 62, 210). Donald B. Sherwood, the representative of the insurance company which paid this claim, testified that claims were paid on the basis of the actual cost of the goods stolen, or of

their inventory value, whichever was lower. He further testified that it was customary in the jewelry business to carry property in inventory at its actual cost at first, later reducing it, for inventory accounting purposes, below that cost. (R. 63.) Thus, the $4,600 paid by the insurance company in settlement of the claim undoubtedly represented at most the fictitious inventory value of the jewelry (R. 65), which was below the actual cost to the wholesaler. In determining the wholesale price to retailers, i. e., the wholesale market value, of the goods, it obviously would be necessary to add to the cost thereof a mark-up to cover overhead and other costs, plus a margin of profit.[7] Thus it is clear that even the wholesale market value of the jewelry here involved was substantially more than $5,000.

However, as held by the Circuit Court of Appeals for the Eighth Circuit, the proper standard of value for the purposes of the National Stolen Property Act is, in a case like the present one, the retail market value. *Husten* v. *United States,* 95 F. 2d 168, 171, cited by the court below (R. 474). Herbert Ollendorf, who has been in the wholesale jewelry business for fifty years (R. 205) and one of whose duties was to prescribe suggested retail prices for the jewelry sold by his company (R.

[7] Nettie Zipper, who had been employed in the jewelry business for about thirty years (R. 336), testified that the wholesale company for which she worked added a mark-up of about 33⅓% to its costs in selling to retailers (R. 337).

212), testified that the retail value of the jewelry carried by his brother Walter on the trip in question was approximately $15,000 (R. 222).[8] It is clear, therefore, that the value of this property was well over $5,000.

Petitioner, however, contends (Pet. 8–9) that it was not shown that all the jewelry which Walter Ollendorf had taken with him on his trip from New York was stolen in Detroit, or that the value of the stolen property transported from Detroit to Chicago was $5,000 or more, since some of the stolen jewelry had been abandoned and burned by the thieves in the outskirts of Detroit (R. 285, 287, 288). The jury, however, was warranted in believing that all the jewelry which Walter Ollendorf had originally taken with him was stolen. This jewelry was used by him as samples, from which orders were taken, and was not to be sold by him (R. 210, 218–219).

The jury also could reasonably infer that only an insignificant amount of the jewelry stolen was burned by the thieves. Banning testified that after the theft the thieves went to Sidran's home in Detroit (R. 83–84):

> We went down to the basement and opened up the merchandise on a beer table. * * * we opened the stuff up on a table and took them out of the bags and

[8] Witnesses long acquainted or associated with the jewelry business testified to retail markups over wholesale prices of from 50% to 100% (R. 66–67, 337), and to margins of about 100% between retail and manufacturers' prices (R. 351, 362).

put it in this brief case. Those were the three bags taken from the room in the Book-Cadillac. The bags contained mostly watch cases and pendants and maybe a few pins, as I recall it. * * * They were attached to the cardboard. They were bound around a cardboard display—the way they carry them in the bag. We disassembled it from the display cards. The jewelry was put into a brief case and the display cards were all put back in the two empty cases. The brief case was one of those three cases that belonged to this man Ollendorf.

He testified as follows concerning the two sample cases (R. 89):

* * * Then we continued back to the highway and on out about two miles, and took these two bags, stopped at the station, bought a gallon of gasoline, took these two bags out of the car, and walked down maybe 200 yards down a country road, and set them afire in the road. * * * Those were the two bags we had taken out of the Book-Cadillac Hotel. We drove on into Chicago.

The COURT: Are those the two bags that are supposed to have contained the jewels when they took them from the hotel?

* * * * *

The WITNESS. That is, two of the three bags. The two bags had all the cardboard and different things that we didn't want, we put in these two bags and burned it all.

The COURT. Who took the other bag?

> The WITNESS. Graves took the bag of jewelry.
>
> The COURT. You took all the jewelry and put it in one bag and burned these bags, * * *.

And in discussing his meeting with petitioner in Chicago the next day, Banning testified (R. 94):

> The merchandise I had on display in my room in the Southmore Hotel, on the morning of September 14, 1940, when Gordon, myself, Sidron, and Graves were present, was the merchandise I and others had stolen from that room in the Book-Cadillac Hotel on the morning of September 13. * * * It was the merchandise I was discussing as the merchandise that had been taken from the hotel room when I was talking to Gordon.

The trial judge specifically charged the jury that one of the essentials of the crime was that the stolen property transported must have a value of at least $5,000 (R. 439–440).

As we have seen, the value of the stolen property was substantially more than $5,000. There is no reason to believe that the thieves had any intention of abandoning any of the stolen jewelry. The natural and most reasonable inference from the testimony is that in removing the apparently great many items from the cardboard to which they were attached, the thieves overlooked a few items. To assume that any substantial quantity of the jewelry was neglected would be contrary

to ordinary experience. Further, it is natural to assume that had any significant amount of jewelry been left in the sample cases and burned, that fact would have been noted by the policemen and firemen who went to the fire. However, it appears that only a small amount of jewelry was found at the fire. Policeman Walter Zink, for example, testified that at the fire they found "quite a few trays, like watch trays, and some small pieces of jewelry" (R. 287).

4. Petitioner's contention that the imposition of the maximum sentence for each of the crimes committed amounts to cruel and unusual punishment does not warrant review by this Court. It is not argued that the statute is unconstitutional because of the punishment prescribed therein; nor is it claimed that the sentences imposed were not authorized by the statute. In view of these facts, the action of the trial court in imposing sentence is not open to review. As stated by the Circuit Court of Appeals for the Fourth Circuit in *Tincher* v. *United States,* 11 F. 2d 18, 21, certiorari denied, 271 U. S. 664:

> The sentences imposed were within the limit prescribed by the statute; and it is well settled that in such case the action of the trial judge will not be reviewed on appeal, except in case of gross or palpable abuse, which does not exist here. The judge who tries the case and hears the testimony is the best, as he is the sole judge

of the merits, and if he acts within the boundaries prescribed by law his decision is final and unreviewable in an appellate court.

Cf. *United States* v. *Sorcey*, 151 F. 2d 899, 903 (C. C. A. 7), certiorari denied, 327 U. S. 794; *Russell* v. *United States*, 119 F. 2d 686, 689 (C. C. A. 8); *Moore* v. *Aderhold*, 108 F. 2d 729, 732 (C. C. A. 10); *Bailey* v. *United States*, 74 F. 2d 451, 453 (C. C. A. 10).

CONCLUSION

The petition for a writ of certiorari presents no question requiring further review by this Court. We therefore respectfully submit that it should be denied.

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